Dvorak v. Commissioner, 64 T. C. 846 (1975)

Documents prepared during an investigation are not considered work product if they were not created in anticipation of litigation.

Summary

In Dvorak v. Commissioner, the Tax Court held that affidavits obtained by IRS special agents during an investigation were not protected as work product under Rule 70(b) of the Tax Court Rules of Practice and Procedure. The affidavits, which detailed alleged kickbacks received by Dvorak, were sought by the petitioner for discovery. The court, following P. T. & L. Construction Co. , found that these documents were not prepared in anticipation of litigation based on the Abel factors, emphasizing that they were not created by or at the direction of an attorney, were factual and non-adversarial, and did not fix the government's litigation strategy. This ruling underscores the distinction between investigatory and litigation-focused materials, impacting how discovery requests should be analyzed in similar cases.

Facts

Milton N. Baromich, trustee of Calumet Township, was investigated by the IRS Intelligence Division for filing false income tax returns. During this investigation, Baromich implicated Nena L. Matau Dvorak, an employee in his office, as having received kickbacks. Special agents obtained affidavits from third parties alleging that Dvorak received kickbacks in 1964 and 1965. Dvorak was later indicted and convicted for filing a false tax return. In a subsequent tax court case, Dvorak's counsel requested the affidavits to prepare a defense against the IRS's allegations of unreported income and fraud penalties.

Procedural History

Dvorak filed a motion under Rule 72 of the Tax Court Rules of Practice and Procedure to compel the IRS to produce the affidavits. The IRS objected, arguing that the affidavits were work product prepared in anticipation of litigation. The Tax Court reviewed the motion and the IRS's objections, ultimately ruling that the affidavits were not protected under the work product doctrine.

Issue(s)

1. Whether the affidavits obtained by IRS special agents were prepared in anticipation of litigation and thus protected under the work product doctrine?

Holding

1. No, because the affidavits were not prepared in anticipation of litigation but were part of an ongoing investigation, as per the Abel factors and the precedent set in P. T. & L. Construction Co.

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Court’s Reasoning

The Tax Court applied the five Abel factors to determine that the affidavits were not prepared in anticipation of litigation: they were not created by an attorney involved in the potential litigation, they were factual statements rather than adversarial in nature, and they did not set the government’s litigation strategy. The court noted that many investigations do not lead to litigation, and thus, the affidavits were investigatory rather than litigation-focused. The court also distinguished between the Tax Court’s discovery rules and the Federal Rules of Civil Procedure, emphasizing that the availability of the affiants or their willingness to testify was irrelevant under Rule 70(b). The court rejected the IRS’s arguments regarding potential impeachment and the sufficiency of Dvorak’s existing knowledge, citing analogous case law that supports the right to full discovery of details pertinent to the case.

Practical Implications

This decision clarifies that documents created during an IRS investigation, which are not directly tied to litigation, are not protected as work product. Legal practitioners should distinguish between investigatory materials and those prepared specifically for litigation when making or defending against discovery requests. The ruling emphasizes the importance of full disclosure in tax cases to ensure a fair defense, particularly when fraud penalties are at stake. Subsequent cases involving similar issues of discovery in tax disputes should consider this precedent when determining the applicability of the work product doctrine.

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